

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**COMMENTS OF SUPRA TELECOMMUNICATIONS
AND INFORMATION SYSTEMS, INC**

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INTRODUCTION

Supra Telecommunications and Information Systems, Inc. (“Supra” or “Supra Telecom”) a competitive local exchange carrier (“CLEC”) providing competitive local telecommunications services in Florida pursuant to Section 214 of the Communications Act of 1934 and state certificates of public convenience and necessity, hereby submits comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking in WC Docket No. 04-313 and CC Docket No. 01-338.

In the Commission’s NPRM issued on August 20, 2004, the Commission sought comment on how to respond to the D.C. Circuit’s *USTA II* decision in establishing sustainable new unbundling rules under sections 251(c) and 251(d)(2) of the Act. Specifically, the Commission sought comment on the changes to the Commission’s unbundling framework that are necessary, given the guidance of

the *USTA* // court. Supra presents these comments in response to the Commission's request.

BACKGROUND

Supra provides competitive telephone service to approximately 260,000 residential and small business customers in Florida, primarily in BellSouth Telecommunications, Inc.'s ("BellSouth") territory. Supra offers discounts of up to 50% off of BellSouth's standard retail rates. Supra relies heavily on the availability of UNE-P to cost-effectively build up a base of residential and small business customers in new markets sufficient to justify installing its own facilities (e.g. telecommunications switches). Using UNE-P as an entry strategy, Supra has been able to justify installing its own facilities in a number of exchanges and has begun rolling customers over to its own facilities. However, as a direct result of BellSouth's exorbitant and cost-prohibitive non-recurring charges for hot cuts compounded by BellSouth's poor operational performance in executing hot cuts, Supra has only cut-over a fraction of its customers.¹

Although Supra is working hard to serve its customers through its own facilities, there are still many areas in BellSouth's territory where Supra still needs to use UNE-P to reach many of its customers. This continued reliance upon BellSouth's UNE-P product is due to BellSouth's local network design in that it prevents

¹ Supra has encountered significant economic and operational barriers to entry as it has tried to maneuver through BellSouth's hot cut process in converting customers from UNE-P to UNE-L. Not only is BellSouth's non-recurring charge of \$59.31 for hot cuts exorbitant and cost-prohibitive, but BellSouth's poor performance in executing hot cuts has been competitively damaging.

Supra from using Supra's facilities with many of BellSouth's loops. In fact, the problem is so great that in some BellSouth local exchanges, Supra estimates that over half of BellSouth's residential customers can only be reached via UNE-P as BellSouth does not have enough facilities to convert the loops to UDLC which would allow Supra to serve its customers via UNE-L.² Thus, even if Supra has a switch deployed to serve mass market customers in those exchanges, it would be unable to serve many of those residential customers if UNE-P were eliminated. The elimination of UNE-P would prevent Supra from being able to serve many BellSouth customers and cost-effectively enter new markets.

Of the nearly one (1) million lines that CLECs sell in BellSouth's territory in Florida, approximately 70% or 693,000 are provisioned through UNE-P. As the Florida Public Service Commission's ("FPSC") Staff noted, "[i]n Florida, 73% of CLEC residential lines are served via UNE-P."³ UNE-P was vital in Supra's capturing of market share and serving customers that cannot be reached via UNE-L. It is ironic that UNE-P was the tool that allowed local competition to develop to the extent which enabled BellSouth to receive 271 approval and enter the in-region long distance market; yet now that BellSouth has received 271

² For POTS loops served via UDLC, IDLC or IFITL, Supra is experiencing large amounts of order failures because the facilities necessary to convert the volume of loops Supra requires in order to convert to UNE-L are not available. See Rebuttal Testimony of David N. Nilson in Docket No. 030851-TP before the Florida Public Service Commission; In re: Implementation of requirements arising from Federal Communications Commission triennial UNE review: Local Circuit Switching for Mass Market Customers; p. 49.

³ See page 17, "Annual Report on Competition: Telecommunications Markets in Florida as of June 30, 2003", The Florida Public Service Commission's Office of Market Monitoring and Strategic Analysis, June 30, 2003.

approval, UNE-P is the one tool that BellSouth and the other ILECs most want to eliminate.

Supra has also spent hundreds of thousands of dollars building its own interoffice transport network; however, Supra still relies heavily on access to BellSouth's unbundled interoffice transport to access many of BellSouth's central offices where neither Supra nor third party vendors have built competing transport facilities. Thus, without access to BellSouth's unbundled interoffice transport, Supra will no longer be able to serve residential customers in those central offices not served by Supra's or a third party's own transport network. For CLECs serving the residential mass market, UNE-P and UNE transport are vital to their success.

SUPRA'S RESPONSE TO SPECIFIC REQUEST FOR COMMENTS

In the FCC's Notice of Proposed Rulemaking in WC Docket No. 04-313 and CC Docket No. 01-338 issued on August 20, 2004, the Commission sought comment on how to respond to the D.C. Circuit's *USTA II* decision in establishing sustainable new unbundling rules under sections 251(c) and 251(d)(2) of the Act. The Commission sought comment on a number of issues. Supra will respond to the Commission's questions in the order in which they were presented in the NPRM.

Question 1 - Do ILEC tariffed services and BOC section 271 access obligations fit into the Commission's unbundling framework?⁴

While tariffed ILEC service offerings and 271 access obligations may have the potential to one day serve as substitutes for UNEs priced at TELRIC, they are far from sufficient today. An ILEC's tariffed service offering would only be sufficient if it could be substituted for UNEs on the same economic and operational basis. That is, from an economic perspective, the tariffed price must be equivalent to the TELRIC price. From an operational perspective, CLECs must be allowed to use the ILEC's tariffed service to provide any service and be able to combine the ILEC's tariffed service with other UNEs without any restrictions. Unfortunately, ILEC tariffed services are priced far above TELRIC price and cannot be combined with other UNEs or used to provision any telecommunications service a CLEC desires to offer unlike current UNEs which are priced at TELRIC and can be combined with other UNEs and used to provision any telecommunications service a CLEC desires.

Supra serves its customers via UNE-P and UNE-L facilities. BellSouth's current tariff does not offer any service that is a workable substitute for either of these services. First, BellSouth does not have a tariffed offering that could replace UNE-P. Second, tariffed service offerings such as DS0 loops could not be substituted for UNE loops because they are not economically or operationally

⁴ See FCC's TRO. Para. 9.

viable alternatives. Although DS0 loops are physically similar to UNE loops; BellSouth has priced DS0 loops far above the price of a TELRIC-priced unbundled loop. For a UNE loop, BellSouth charges \$9.77 in zone 1, \$13.88 in Zone 2, and \$24.63 in Zone 3. The average weighted loop cost is \$13.75, approximately equivalent to the rate in Zone 2.⁵ By comparison, BellSouth charges \$58.08 for a DS0 loop.⁶ Supra, and other CLECs, could not effectively compete for customers if loop costs are more than quadrupled to \$58.08.

The DC Circuit Court said that BOC section 271 access obligations did not require the BOCs to price UNEs at TELRIC as is required under section 251. However, if the BOCs are not required to price such at a reasonable price (i.e. something close to TELRIC price) that would represent a truly competitive market, CLECs simply be unable to compete. TELRIC pricing is a regulatory construct designed to be a substitute for pricing in a competitive market. If there were two or more other providers of that UNE in the market, then competitive pressure would drive the price down to TELRIC prices. However, without sufficient competition in these markets, the BOCs are given carte blanche to raise UNE prices to monopoly levels and freeze out CLEC competitors. The exorbitant “market” prices which the BOCs seek to charge provide conclusive evidence that there are no alternatives to UNE transport and switching in the

⁵ This price reflects Supra’s weighted average loop cost for serving mass market customers (residential and small business) in BellSouth’s territory in the State of Florida.

⁶ See BellSouth’s Access Services Tariff; Section E7. Dedicated Access Services, E7.5 – Rates and Charges; E7.5.2 Telegraph Grade (a.k.a. BellSouth® SPA Telegraph) Service, E7.5.2.A.1. Local Channel rate of \$29.04 per point of termination

mass market. To compound the lack of competition, BellSouth has begun undercutting the prices of Supra in the mass market by actually providing equivalent end-user services for which Supra must pay BellSouth UNE prices at approximately \$28.00, at the price of \$26.95, while simultaneously providing \$100 cash back and a \$25 gift card.⁷ For BellSouth to argue that it is losing money under TELRIC pricing, is a direct contradiction to its arguments before the FPSC wherein BellSouth argues that it makes a profit when it sells its PreferredPack service at \$26.95 and gives away \$100 cash back and a \$25 gift card.⁸, ⁹. In fact, under BellSouth's math, it would still make a profit if the cash back amount was tripled or even quadrupled.

In addition to the onerous prices BellSouth charges for identical facilities provisioned as tariffed services rather than TELRIC-priced UNEs, BellSouth, and other ILECs, impose onerous terms and conditions on the use of tariffed services so that CLECs cannot use them to provision services for a significantly lower cost. For example, ILECs prohibit CLECs from combining loop and transport network elements to provide special access services to its customers regardless of whether Supra self-provides its own entrance facilities, unless Supra uses the combination to provide a "significant" amount of local exchange service, in

⁷ See BellSouth's PreferredPack Plan Tariff in the State of Florida.

⁸ See FPSC Docket No. 040353-TP, *In re: Petition to review and cancel, or in the alternative immediately suspend or postpone, BellSouth Telecommunications, Inc.'s PreferredPack Plan tariffs, by Supra Telecommunications and Information Systems, Inc.*

⁹ Note that BellSouth is no longer offering the \$25 gift card, but does continue to offer the \$100 cash back.

addition to exchange access service, to a particular customer.¹⁰ To the extent Supra requests to convert any special access services to combinations of loop and transport network elements at UNE prices, Supra must provide BellSouth with a written letter certifying that Supra is providing a “significant” amount of local exchange service over this combination. The ILECs fought so vigorously against CLECs using loop and transport UNE combinations as substitutes for special access that they convinced the FCC to support their onerous position and issue an order in support. Competitive markets don’t operate in this manner. In a competitive market, buyers are free to combine products and services in any way imaginable to create new services or duplicate other existing services with one of the major goals being to find a way to reduce the cost of providing existing services.

Question 2 - How should relevant markets be defined (e.g., product markets, geographic markets, customer classes) to develop rules that account for market variability and to conduct the service-specific inquiries to which *USTA II* refers?

The DC Court in *USTA II* required the Commission to analyze impairment for all “telecommunications services” and suggested that the impairment analysis must account for specific characteristics of the market in which a particular requesting carrier operates.¹¹ Given the different nature and characteristics of the several

¹⁰ See the Florida BellSouth-Supra Telecom Interconnection Agreement section 2.15.1.

¹¹ See *USTA II*, 359 F.3d at 575-577, 591-92

network elements, different markets must be developed. For example, while it is reasonable to consider a wire center as a reasonable geographic market for purposes of analyzing impairment for mass market unbundled switching, it is not reasonable to consider a wire center a reasonable geographic market for purposes of analyzing impairment for unbundled transport. Additionally, markets should be analyzed based on residential (mass market – less than 4 lines) and business (4 lines or more).

The geographic market area for mass market unbundled switching should be defined as the ILEC wire center.

In the August 2003 Triennial Review Order, the FCC made clear that “state commissions cannot define a market as encompassing an entire state and that they should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market.”¹² States should consider CLECs’ ability to self-provision switches or use switches provided by a third-party wholesaler¹³ to serve various groups of customers varies by geographic market. The FCC went on to say that if a CLEC was serving only a certain geographic area with its own switch, then the state commission should consider establishing those areas

¹² See TRO para. 495.

¹³ There is not one single wholesale provider of unbundled local switching (or equivalent) operating in the state of Florida. Supra has searched long and hard to find such an alternative.

as separate markets.¹⁴ Additionally, the state may consider using other geographic market definitions that were used for determining retail rates, UNE loop rate zones, and intrastate universal service funding.

Given the guidelines set forth in the TRO, the FCC should define the relevant market area for the mass market local switching impairment analysis as the ILEC wire center. Additionally, the FCC should continue to define mass market (residential) as less than 4 lines. A market differentiation between residential (mass market – less than 4 lines) and business (4 lines or more) has already been used by the FCC as a reasonable market segmentation in previous orders to carve out the exception for where ILECs are required to provide unbundled switching. In the First Triennial Review Order, the FCC carved out an exception for enterprise switching in the top 50 MSAs and defined the residential mass market as customers with less than 4 lines and the business market as customers with 4 lines or more. This market segmentation of delineating residential (mass market) customers from business customers for local switching should also be used for impairment analysis for mass market unbundled switching.

When defining the geographic market areas for mass market unbundled local switching the following factors should be taken into consideration and assigned

¹⁴ See TRO footnote 1537.

relative weights. Specifically, the FCC should consider the following three factors:

- (a) the locations of mass market customers actually being served by CLECs;
- (b) the variation in factors affecting CLECs' ability to serve each group of customers; and
- (c) the CLECs' ability to target and serve specific markets profitably and efficiently using current available technologies.¹⁵

The location of mass market customers actually being served by CLECs affects how the relevant geographic market area for mass market switching should be defined. The closer mass market customers are physically located to a CLEC's switch, the lower the cost to serve those customers is, all other things being equal. But the actual telephone service being provided to customers is a significant consideration here. For example, although much will be discussed in this proceeding regarding serving multiline customers over a DS1, or higher, loop; Supra, like other CLECs that serve mass market customers, provides over 250,000 lines of POTS service. The majority of Supra's POTS services are provided over 1 or 2 line configurations which is a substantially different scenario than using DS1 and DS3 to serve large business customers.

¹⁵ See TRO para. 495.

For POTS service, it is substantially less expensive for a CLEC to serve customers in the same wire center where its switch is collocated with the ILEC's switch than it is to serve those same customers from a different wire center several miles away. Large multiline customers which can be cost effectively served by DS1 loops¹⁶ and can be efficiently cross connected to either a switch in the serving wire center, or to transport which will carry the call back to a switch located remotely. On the other hand, 2-wire POTs service requires electronics equipment be collocated, or leased,¹⁷ in every central office or remote terminal where the two wire copper is terminated, in order to transport the call back to a switch. If the market were defined as an entire metropolitan calling area rather than a local exchange, the CLEC must transport traffic across that market to its switch. A CLEC that must transport calls to a distant switch faces higher transport, collocation, and equipment costs than a CLEC that can terminate call to a switch within the present exchange.

A wire center located in an urban area with a higher population density will have lower per unit costs than a wire center located in a rural area with a lower population density. Geographic areas should be defined based, in part, on population density since the consumer response to mass market advertising is directly proportional to the number of customers who can see the advertising,

¹⁶ 6-8 lines or more at a given location.

¹⁷ However despite the FPSC orders in Docket Number 990649-TP relative to leased loop concentration equipment, the ability for a CLEC to actually lease such loop concentration from a remote terminal under UNE-L is non-existent. BellSouth refuses to provide such to Supra.

and is directly proportional to the number of customers served in a given wire center, or rate center. However, rate zones for UNE loops are too large and do not account for other factors which affect a CLEC's cost of providing service to mass market customers.

Supra serves approximately 20,000 customers in one wire center, yet serves less than 3,300 customers in the adjoining wire center. This demonstrates the price inelasticity mentioned above, and calls into question any wide area averaging that may be proposed by an ILEC. While these adjacent wire centers are both in the same rate center and same UNE rate zone, applying a single number threshold to both wire centers may be punitive to the CLEC. Competition occurs on a wire center by wire center basis. Collocation decisions, cost justifications and expenditures must happen on a wire center by wire center basis, particularly for POTS customers. Rate centers show large variances from wire center to wire center, although a rate center is far more palatable than defining the market as a UNE rate zone, provided there is a demonstrable ability to provide a CLEC with more than 20,000 conversions per month to 2-wire POTS EELS. However, ILECs do not have this ability today. Thus, it would be inappropriate to set a threshold based upon an arbitrarily large boundary such as a UNE rate zone.

There are a number of factors that affect a CLECs' ability to serve customers in a particular wire center. The cost of serving a customer as well as the revenue that

can be collected from each customer are two key factors that affect a CLECs' ability to serve each group of customers and can vary significantly by wire center. These cost factors include UNE loop rates, the size and location of a wire center, the availability of EELs¹⁸ and the availability of collocation space. UNE loop rates vary by ILEC and by zone density. The less dense the zone, the higher the rate; plus, some ILECs have higher rates than others for zones with similar densities. The size and location of a wire center impact costs as well. A large wire center, or a wire center serving 40,000 lines, will have lower per unit costs than a small wire center that serves only 2,000 lines. Likewise, a wire center located in a densely populated area will also have lower per unit costs because the CLEC will be able to reach more customers from that site. Additionally, expected revenues per customer vary by ILEC and by population density. Rates in urban areas are generally lower than rates in rural areas and have to be weighed against costs of serving customers. Furthermore, ILECs charge different rates for the same services. A CLEC must consider all of these factors before choosing to enter a particular wire center.

Even if a CLEC has collocated a switch in the ILEC's central office, the CLEC still may be unable to serve all of the customers in that central office without access to unbundled local switching. This is so because POTS service is no longer exclusively provisioned via long 2-wire copper loops stretching from the switch to

¹⁸ The ability to order EELS in the same volume, time and manner that UNE-P conversions can be ordered today is an essential key to using geographic areas larger than a single serving wire center, such a rate center.

the customer's premises. Although new technologies such as Integrated Digital Loop Carrier ("IDLC") (a.k.a. loop Concentration) and fiber to the home ("FTTH") have brought about economies of scale to the ILEC, they have also require that such facilities be modified in order to convert CLEC customers from UNE-P to UNE-L. In some BellSouth wire centers, more than 70% of the customers are served by IDLC - high capacity transport circuits that run from the switch to Digital Loop Carrier ("DLC") equipment in remote terminals ("RTs").

Another factor that affects a CLECs' ability to serve customers in a particular geographic area is whether an ILEC has and will make sufficient collocation space available. If the ILEC does not have any collocation space available, then the CLEC must build its own suitable collocation space, which is prohibitively more expensive. EELs were supposed to eliminate this problem and provide a seamless, solution so that a CLEC did not have to collocate in the hundreds of wire centers in the ILEC's territory. However, 2-wire POTS EELs cause the same problems or impairments for the ILEC as they do for the CLEC. BellSouth simply cannot provide 250,000 POTS EELs to replace the UNE-P service being provided to Supra customers today. Supra on the other hand has been able to collocate in eighteen of Bellsouth's central offices, but is unable to directly provide service without using collocation or POTS EELs in the majority of BellSouth's central offices.¹⁹

¹⁹ See Rebuttal Testimony of David N. Nilson in Docket No. 030851-TP before the Florida Public Service Commission; In re: Implementation of requirements arising from Federal

Until EELs are proven to be available in sufficient quantities and are available within all wire centers in a UNE rate center, the market area should continue to be defined as a single wire center.

Variations in the factors discussed above can greatly affect a CLECs' ability to serve customers in each wire center geographic area. As discussed above, feasibility, availability, volume, cost effectiveness and revenues are key factors. If costs are high and expected revenues are low, then it will not be profitable to serve customers in that geographic area. If an alternative service (i.e. IDLC replacement or EELs) are either unavailable or result in an underlying cost factor that exceeds the ILECs cost of provisioning the same service to the same customer, it again will not be profitable to serve customers in that geographic area, and competition will withdraw.

Additionally, as discussed above with the non-cost factors, if collocation is not available in a certain wire center, then a CLEC cannot enter that geographic market on a cost-effective basis regardless of other favorable cost factors. This may be due to the unavailability of EELs and wholesale loop concentration via IDLC. Solutions to both of these problems require a certain volume of customers in a central office before they are cost effective. A solution that does not enable

Communications Commission triennial UNE review: Local Circuit Switching for Mass Market Customers; p. 19.

cost-effective competition with the ILEC will cause CLECS to either fail, or withdraw from the market. The ILECs have no incentive to voluntarily provide cost-effective solutions.

When serving the POTS market, CLECs often face higher costs than the ILEC even if one assumes UNE prices are TELRIC-based and actually reflect the ILEC's true cost. Since the CLECs are using the same loops as the ILEC and collocating in the same central offices (assuming collocation is truly cost based) to reach the customers, CLECs theoretically should face the same cost structure as the ILEC. However, in addition to these costs, the CLEC must pay enormous nonrecurring charges²⁰ to the ILEC to convert a customer's service from UNE-P to UNE-L customer's service.²¹ Additionally, many CLECs are using the same switching technology as the ILECs meaning they will face similar switching costs. Thus, in terms of technology and operational costs, the CLEC faces costs that at best are similar to the ILEC's costs, but often, higher than the ILECs due to NRCs. The rate Bellsouth is charging for the hot cut nonrecurring charge means the CLEC will not even begin to break even until after the seventh month of service even if the customer is already a UNE-P customer of the same CLEC!

²⁰ The FPSC has ordered that the conversion from BellSouth retail to UNE-P of a working telephone number be performed at a rate of \$0.102 (10.2 cents). Yet BellSouth is billing \$59.31 to convert the **same** working UNE-P line to a UNE-L loop. Since the FPSC has never looked at this rate, Bellsouth believes it can charge whatever it chooses in effecting what is essentially the discontinuation of unbundled local switching, without regard to duplicative or avoided costs. Almost \$60 will be charged to each CLEC to disconnect the unbundled local switching if this Commission eliminates ULS!

²¹ BellSouth currently charges Supra \$59.31 for a retail to UNE-L hot cut and uses that same rate for a UNE-P to UNE-L hot cut.

Supra is currently challenging this exorbitant rate before the Florida Public Service Commission.

The Commission should be careful not to define the market area too large. If the geographic area is defined too large, it would make it impossible for CLECs to have a meaningful ability to compete with the ILEC and would drive all of the CLECs out of that market leaving local telephone users with the incumbent monopolist as their only choice for local telephone service. Such a result would be disastrous and send us back to the days of local monopoly phone service. Local competition and Florida local telephone consumers will benefit from cautiously erring towards competition and defining the geographic area a bit too small rather than too large.

Recommendation for Defining Geographic Markets for mass market switching.

Supra recommends that the Commission use existing wire centers as the appropriate geographic market for evaluating impairment for mass market switching. To use an area larger than an existing wire center would place CLECs at a severe competitive disadvantage. For example, if a geographic area were defined to include all of the wire centers in a metropolitan area it may be possible for the ILEC to game the system such that only one of the wire centers had collocation space available forcing CLECs to collocate in that remaining wire

center to enter that geographic area. That coupled with the unavailability of EELS would render that CLEC ineffective at serving the mass market defined by the surrounding rate center. The ILEC would choose the wire center that was furthest away from the desired customer base. This would prevent the CLEC from being able to serve customers in other wire centers at all and would render mass market advertising costly, problematic and ineffective for the CLEC, all of which benefit only the ILEC and its bottom line. It is possible that CLECs could reduce their costs of serving their targeted customer base by choosing to collocate in wire centers that were located closest to their targeted customer base or had lower costs due to higher population density by the wire center or access to more loops at that wire center. However every CLEC capital expenditure would be a gamble. Without UNE-P it would not be possible to acquire a sufficient number of customers to justify collocation of network facilities. In effect, the industry would revert back to a "build it and hope they will come" footing. Although an interesting premise for a movie, this strategy has proven to be a disastrous way for CLECs to build a network.

The only way to ensure that CLECs would be unhindered by artificial regulatory limitations or ILEC gamesmanship would be to define each wire center as the relevant market, and to establish a minimum level of lines, under which a CLEC is entitled to UNE-P and above which the CLEC would be given a certain amount of time to collocate, or UNE-P would no longer be available, to that CLEC, in that office. Thus, for an ILEC to meet the triggers to no longer provide UNE

switching, the ILEC would be forced to ensure that collocation was available at each central office and that it performed hot cuts and batch cuts for CLECs at parity with that it would provide for itself. This would help to place the CLEC on a more equal footing with ILEC in designing their network by allowing the CLECs full access to all ILEC central offices with hot cuts and batch cuts at parity.

Therefore, the relevant markets for determining impairment for mass market switching should be each wire center as defined by the ILECs' retail rate tariff. Alternatively, the Commission should not consider an area larger than a rate center; but should only consider that alternative when EELs could be cost effectively deployed throughout a rate center and the CLEC had a switch physically located within the rate center boundaries itself. No consideration for eliminating UNE-P should be given when a switch serving the rate center is physically located outside the rate center due to the added costs of serving that rate center with a distant switch.

The geographic market area for unbundled transport should be defined on a route-by-route basis.

The specific purpose of interoffice transport is for LECs to connect their switches to each other. Hence, it is reasonable to define a geographic market for interoffice transport on a route-by-route basis. The mere presence of fiber facilities deployed within a wire center does not ensure that those same fiber

facilities can be utilized to connect two wire center switches together. While alternative access providers have built fiber routes in major metropolitan areas to connect business customers located in large buildings to interexchange carriers POPs (points of presence), those facilities may not be and are probably not connected to multiple ILEC central office switches so they would not be able to provide alternative transport between ILEC central offices.

Additionally, while cable television network facilities are ubiquitous in many areas and theoretically have the ability to be modified to carry telecommunications traffic, the fact remains that very few of those cable facilities are connected to ILEC central office switches let alone provide any type of interoffice transport for telecommunications traffic. Furthermore; unlike telecom carriers, most cable MSOs have not yet discovered that there is revenue in their underground fiber and have refused to resell capacity to any carrier.

The geographic market area for local loops should be defined on a loop by loop basis.

Local loops will likely be the last network element to face true competition. Ironically, despite the fact that there are several providers of alternative loops

(wireless and cable),²² none of these alternatives are, as yet, being made available to CLECs that use a traditional wireline technology. In reality, for wireline-based CLECs, the local loop remains a monopoly provided element and is likely to remain such for the foreseeable future.

Similar to interoffice transport routes, it is reasonable to define a geographic market for local loops on a route-by-route basis. The mere presence of alternative loops technologies to the same customer premise does not ensure that those same alternative loop technologies can be utilized by the CLEC to reach the end user customer. While wireless carriers and cable television companies have expanded their networks to reach many residential mass market customers those facilities are not available for CLECs to use to reach mass market customers. Accordingly, the impairment standard for mass market loops must only consider technologies and facilities that are truly available to the CLEC and not theoretical possibilities. Hence, the geographic market for local loops to residential mass market customers must be defined on a route-by-route basis.

Question 3 - In regards to the FCC's 12 month plan to transition to new rules, are there circumstances in which particular final rules would

²² These alternative loops include cellular and PCS wireless providers reaching customers via wireless technology, cable television companies using hybrid fiber-coaxial networks, and electric utilities experimenting with providing voice service over electrical power lines.

necessitate additional transition mechanisms apart from or beyond this second six-month phase? For example, we seek comment on what additional transition mechanisms, if any, would help to prevent service disruptions during cut-overs from UNE facilities to a carrier's own (or third-party) facilities, or for conversions to tariffed or other service arrangements, and would be consistent with the court's decision.

Yes, transition rules need to be established that will allow for a smooth transition from an ILEC's UNE facilities to a CLEC's own facilities in those instances where the FCC has determined that CLECs are no longer impaired without access to the ILEC's unbundled network elements. This is particularly true for converting a CLEC from the ILEC's unbundled switching to the CLEC's own switch given the ILECs' proven poor performance in conducting hot cuts and their apparent inability to conduct hot cuts in commercial volumes. Nothing would be more disastrous than for residential telecommunications users to lose dial tone due to an arbitrarily imposed cut-over timeline that the ILEC is incapable of meeting. Rather than setting a date certain or six month deadline for ILECs to cut over all of a CLEC's customers, the FCC should tailor the deadline to the unique and specific impairment findings in each geographic market and to the specific capabilities of the ILEC to timely and efficiently conduct hot cuts.

In the Florida PSC's TRO investigation, many CLECs, including Supra, testified to BellSouth's inability to conduct hot cuts in commercial volumes. BellSouth's

own witness, Kenneth Ainsworth, Director of Interconnection Operations testified that BellSouth viewed 263 hot cuts in one central office to be a large quantity of hot cuts.²³ Later in his testimony, Mr. Ainsworth refers to the BellSouth imposed limit of only 125 loops per day per central office in praise of Bellsouth's ability to handle that large of capacity.²⁴ Mr. Ainsworth further testified that BellSouth allowed 655 orders (including 264 in one central office) to be scheduled on a single day. Even with BellSouth's self-proclaimed "record" of 655 hot cuts in one day, it would take Bellsouth 397 business days or 19 months just to convert over Supra's existing customer base of 260,000 customers; far longer than the six month transition period proposed in the NPRM. However, BellSouth provided no evidence in the Florida TRO proceeding that it would be able to sustain a peak rate pace of 655 hot cuts per day for 18 months meaning that it would likely take BellSouth much longer than 18 months to convert all of Supra's existing customer base. BellSouth's astonishingly slow performance does not even consider the cut over needs of other CLECs in BellSouth's territory in the State of Florida and the impact that would have on BellSouth's inability to cut over commercial volumes of customers to CLEC switches.

²³ See Direct Testimony of Kenneth Ainsworth in Florida Public Service Commission Docket No. 030851-TP Filed: December 4, 2003; In re: Implementation of requirements arising from Federal Communications Commission triennial UNE review: Local Circuit Switching for Mass Market Customers; p. 15, lines 1-8.

²⁴ Supra had requested the ability to order up to 300 lines per office per day, a volume BellSouth refused stating they did not have the capacity to support it at a March 5, 2003 inter-company meeting.

It is imperative that transition rules be structured such that there is not an arbitrarily established deadline for the ILEC to complete cutovers in a time frame that they cannot possibly meet based on past performance. Rather, the ILEC should be required to continue to provide unbundled local switching in those areas where it has been determined that CLECs are no longer impaired without access to mass market unbundled local switching until the ILEC has successfully converted all of the CLECs existing facilities over to UNE-L. The same transition guidelines should be implemented for the conversion of any unbundled network element to either the CLEC's network facilities or the ILEC's tariffed services.

Question 4 - How should the FCC apply the Commission's unbundling framework to make determinations on access to individual network elements? Thus, we seek comment, including evidence at a granular level, on which specific network elements the Commission should require incumbent LECs to make available as UNEs in which specific markets, consistent with *USTA II*, and how the Commission should make these determinations.

The FCC should continue to find that CLECs are impaired without access to all currently unbundled network elements as defined in previous FCC local competition orders.²⁵ To reach such a conclusion should not be surprising. The

²⁵ See First Report and Order in CC Docket No. 96-98 In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; para. 366. "...we require incumbent LECs to provide unbundled access to local loops, network interface devices, local and

monopoly-built national local telecommunications network was, and continues to be, a capital intensive investment. It will take decades and billions of dollars of investment capital to replicate that wireline network. Although hundreds of CLECs to date have invested hundreds of billions in their own networks, they are still woefully short of duplicating the ILEC's network. Hence, it is impossible for CLECs to serve all residential and business telecommunications customers via wireline facilities without access to the ILECs' network. Accordingly, the ILECs' network elements should continue to be unbundled and be accessible to CLECs wherever two or more competitive alternatives do not exist. Supra will provide comments regarding some of the major network elements that should continue to be unbundled.

Local Switching for Mass Market Customers Should Continue to Be Unbundled Nationally.

The FCC should find that CLECs are impaired nationally without access to unbundled switching for mass market customers (less than four lines) and that switching for mass market customers should continue to be offered as a UNE. Although the DC Court overturned the FCC's national finding of impairment for mass market UNE switching in the Aug. 2003 Order, the DC Court did so

tandem switching capability, interoffice transmission facilities, signaling and call-related databases, operations support systems functions, and operator services and directory assistance facilities, as described below. These network elements represent a minimum set of elements that must be unbundled by incumbent LECs."

because the FCC did not provide for the possibility of market-specific exceptions authorized by state commissions.²⁶ The DC Court also agreed that hot cut rates often were so high that they caused CLEC entry to be uneconomic and that could be a valid reason to find national impairment; however, the DC Court rejected that argument because the FCC failed to define “uneconomic.” The FCC can remedy this shortfall by providing more specific details as to when CLECs are impaired without access to unbundled switching for mass market customers. By defining the appropriate hot cut rate level benchmarks, ILEC hot cut performance benchmarks, and other criteria, the FCC can define conditions that must exist for efficient CLECs to economically enter a new market without using unbundled local switching. Thus, by defining these conditions, the FCC’s impairment standard can provide the specificity needed to meet the DC Court’s requirements as outlined in USTA II.

UNE switching for mass market customers should be considered impaired based upon the following. CLECs are impaired without access to unbundled switching for mass market customers where:

- 1) The hot cut non-recurring charge is greater than \$6.00 per hot cut²⁷ which constitutes an economic barrier to entry for the CLEC.

²⁶ See DC Circuit Court order p. 20.

²⁷ The \$6.00 rate is slightly higher than the average of hot cut non-recurring charges developed by four independent state regulatory commissions and their investigations into the TELRIC costs of the RBOC conducting a hot cut. The four states are: Minnesota - \$2.38, Pennsylvania - \$4.07,

- 2) Where the ILEC has not proven the ability to cut over 1,000 loops per day per CO with 95% completed correctly without error or the same percentage of correct completions that the ILEC provides to its own customers. (operational barrier).
- 3) In any local exchange wire center where 10% or more of the residential customer base cannot be served with UNE-L.
- 4) All wire centers where a CLEC has less than 3,000 customers unless there are two other competitive (non-ILEC) providers of mass market switching serving that wire center (economic barrier).

A LEC must present evidence that it has cleared each of these thresholds before it will be found that CLECs are not impaired in that market, thus relieving the LEC of pricing UNE switching at TELRIC.

Condition number one of finding impairment where the hot cut price is greater than \$6.00 per hot cut is reasonable because this reflects an average of the TELRIC rate that four state PUCs have determined was just and reasonable after a full investigation of the BOCs' cost of conducting a hot cut. The non-recurring labor costs to execute a hot cut do not vary dramatically between ILECS or from state to state or from region to region. Thus, since a four different state

Vermont - \$6.22, and Idaho \$11.03. The average is \$5.93. See ex parte presentation of MCI in the Matter of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers CC Dockets No. 01-338, 96-98, and 98-147, February 12, 2003. p.3.

commissions have conducted a full investigation of an RBOC's cost to complete a hot cut in Pennsylvania, Vermont, Idaho, and Minnesota, it is reasonable to assume that the cost will be similar for other RBOCs in other states throughout the United States. For example, since the Pennsylvania Commission has determined that Verizon's non-recurring costs to complete a hot cut are \$4.07, it is reasonable to assume that Verizon incurs a similar level of costs to conduct a hot cut in New York, Maryland, Virginia, Texas, California and in all other states where it operates. Further, the BOCs and other large ILECs enjoy the same economies of scope and scale which results in similar prices for the services each BOC offers as is evidenced by the rates set forth in their various state and federal tariffs. For example, under the CALLS proposal, all of the BOCs (and GTE) voluntarily agreed to the same rate of \$0.0055 per minute for interstate switched access.²⁸ This is significant because switched access generated more than \$12 billion in revenue annually prior to the adoption of the CALLS proposal.²⁹ Switched access rate levels are extremely important to the ILECs and to the interexchange carriers that purchase those services because the slightest adjustment in the switched access rate means hundreds of millions of dollars. If switched access costs varied significantly between the BOCs, they would not have all agreed to the exact same rate for switched access. A review of the BOCs' interstate access tariffs and the recurring and nonrecurring charges

²⁸ See "SUMMARY OF CALLS PROPOSAL ACCESS CHARGE PROVISIONS" at http://ftp.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/ncc0029c.html; p. 1

²⁹ See FCC Statistics of Communications Common Carriers 2002/2003 Edition; Table 4.2, p. 170. Available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/SOCC/02socc.pdf

for many access services reveals that the majority of the BOCs' services are priced at similar levels indicating that the BOCs' each face similar costs. Thus, it is reasonable to assume that the BOCs face similar costs for completing a hot cut.

Condition number two of finding impairment where the LEC has not proven the ability to cut over 1,000 loops per day per CO with 95% completed correctly without error or the same percentage of correct completions that the ILEC provides to its own customers is reasonable because a CLEC must be able to convert over its customers to its own switch in a reasonable amount of time. Despite BellSouth's claims of being able to scale up its operations and convert lines on a commercial scale, the fact remains that BellSouth has consistently saddled Supra with a limitation of no more than 125 hot cuts per central office per day. In central offices where Supra has more than 20,000 customers it would take BellSouth 200 business days or nine full months for BellSouth to convert all of Supra's customers to Supra's switch. Additionally, as discussed above, the most hot cuts BellSouth has ever been able to complete in one day was 655. With a customer base of 260,000 customers and growing, it would take BellSouth more than 19 months just to cut over Supra's existing customers to Supra's switches. This means that BellSouth would not be able to cut over any new Supra customers until 1½ years after they sign up for service with Supra today.

Not only must an ILEC be able to cut over a CLEC's loops to UNE-P in commercial quantities, but it complete with at least the same degree of accuracy that it could do for itself. An ILEC's ability to complete hot cuts accurately and complete them in commercial volumes is essential for a CLEC to compete in the local market. If an ILEC cannot cut customers over to the CLEC's switch in a non-disruptive manner and in commercial volumes, then a CLEC is impaired in its ability to provide timely service to its customers. The CLEC's customers will not tolerate waiting for service longer than they would wait if they were Retail or Resale to UNE-P. Hence, Supra proposes that the ILEC be required to provide at 95% of the hot cuts on a timely and error-free basis to the CLEC.

CLEC customers expect to have their service cutover without any service disruption and without needing to make multiple calls (from their cell phone or their neighbor's phone) to their carrier to the resolve problems – which is presently the consequence of the BellSouth cut over process. If The ILEC cannot cut a CLEC's customers over to the CLEC's switch and release the line for LNP porting in a timely and non-disruptive manner, the customers will most often fault the CLEC for the service problems and go back to the ILEC.

Customers may even be aware that the cutover problems are not the fault of the CLEC and still go back to the ILEC simply to avoid any service disruption. Many small businesses such as restaurants that offer take-out, delivery, or require

reservations, dry cleaners, plumbers, home maintenance and construction, and other businesses depend heavily on their phone for customers to reach them. These businesses may refuse to switch to a CLEC even if the CLEC offers better rates, if they are afraid that their phone service will be disrupted and their customers will not be able to reach them regardless of whether the service disruptions are caused by the CLEC or not. The ILEC must be able to perform hot cuts without disrupting the customer's service.

Condition number three of finding impairment in any local exchange wire center where 10% or more of the residential customer base cannot be served with UNE-L is reasonable because CLECs should not be denied the opportunity to compete for customers with UNE-P simply because the BOC lacks the ability to convert the customer to UNE-L. BellSouth has local exchanges where up to 70% of the customers cannot be served with UNE-L on an economically justifiable basis or in a manner that allows Supra to provision the same quality of service as with UNE-P or because loops are unavailable, forcing Supra to keep those customers on UNE-P despite the fact that Supra has installed a switch that is ready and able to serve those customers. Clearly, Supra is impaired from serving customers without UNE-P in those exchanges so Supra should be allowed to continue using UNE-P until BellSouth can modify its facilities to allow Supra to serve those customers via UNE-L.

CLECs should be allowed to serve any mass market customer via UNE-P for as long as the ILEC's facilities are incapable of allowing a CLEC to serve that customer with UNE-L. As will be discussed in greater later in these comments, the extensive use of integrated digital loop carriers in the ILECs' facilities makes it difficult for the ILEC to provision UNE-L over those facilities.

Rather than mandate extensive and laborious investigations of the capability of each and every loop within an ILEC's service territory, it is reasonable to use a de minimis safeguard such as the FCC has used in similar situations. For special access traffic, the FCC uses a percentage threshold to determine when that traffic falls under federal jurisdiction rather than state jurisdiction using the assumption that traffic that is less than the threshold is not significant enough to be of concern to fall under federal regulation. In this particular instance, the percentage threshold would determine when the CLEC would no longer be considered impaired by this particular impairment.

Supra recommends a percentage threshold of 5%. Thus, if fewer than 5% of the customers can only be served via UNE-P and cannot be served via UNE-L, CLECs will not be considered to be impaired even though they have no means to serve those customers with their own facilities via UNE-L. Five percent is a reasonable threshold because of the importance of fostering local competition. Ideally, every residential customer should have a competitive choice; however,

that is not always possible because the ILECs' facilities are built in such ways that do not facilitate UNE-L competition. A threshold of 5% recognizes that it is difficult to ensure that 100% of the residential loops in an ILEC's wire center can be served via UNE-L, yet provides incentive for the ILEC to take steps to improve 95% of its local network facilities so that they will facilitate mass market local competition.

Condition number four of finding impairment in all wire centers where a CLEC has less than 3,000 customers unless there are two other competitive (non-ILEC) providers of mass market switching serving that wire center is reasonable because CLECs entering new markets or wire centers need access to cost-based UNE-P in order to cost-effectively enter a new market. If two other competitive providers (not affiliated with the ILEC) are providing mass market switching in that wire center, then the competition between those two vendors and the ILEC should eventually be sufficient to move prices to TELRIC cost. If there are not two competitive providers of mass market switching in the wire exchange, then a CLEC should be allowed to use UNE-P priced at TELRIC until it has built up a customer base that is large enough for the CLEC to justify installing its own switch to serve that wire center. While each CLEC will have a different threshold of what number of mass market customers it will need to economically justify installing its own switch based on its unique market entry plans, cost structure, and cost efficiencies. 3,000 is a reasonable limit in that it

suggests a reasonably efficient CLEC and is an objective number that makes it relatively easy for the FCC to monitor.

If UNE-P is not available, then resale is the only option for a CLEC to build market share without risking the expense of installing its own switch; however, resale is not sufficient because it will not allow a CLEC to convert to UNE-L as economically or operationally easy as converting from UNE-P to UNE-L. When serving customers with UNE-P, a CLEC has already had the ILEC begin switching customers from the ILEC's network to the CLEC's network. The ILEC has performed a retail to UNE-P hot cut and already charged the CLEC for all of that work. Thus, when the CLEC installs its own switch and converts its customers to UNE-L, it will be operationally easier because it is easier to do a UNE-P to UNE-L hot cut than it is to do a retail to UNE-L hot cut. This is because a significant portion of the work was already completed when the ILEC executed a retail to UNE-P hot cut. From an economic perspective, UNE-P allows a CLEC to generate a higher margin because the CLEC is collecting switched access revenues in addition the 1R rate and rate for CLASS services. Additionally, the costs for a CLEC to serve customers via UNE-P versus resale may be less, in part, due to the fact that the CLEC can self-provision some of its own services including operator services and voicemail.

Analysis of Impairment for local switching

Based on the above definition of impairment for local switching for mass market customers and the definition described above for the appropriate geographic market area for impairment analysis of mass market unbundled switching being the ILEC's individual wire center, Supra finds that CLECs are impaired in all local wire centers in BellSouth's territory in the state of Florida. Supra has not conducted an analysis of wire centers other than those in BellSouth's territory in the State of Florida, but believes that there are likely very few wire centers where CLECs would not be impaired without access to unbundled local switching for mass market customers.

Specifically, BellSouth fails each of the four criteria for set forth above to determine impairment within a geographic market area. First, BellSouth's hot cut nonrecurring charge is \$59.31 which is greater than the rate of \$6.00 nonrecurring charge per hot cut which the FCC should find to be the reasonable rate for determining impairment. Second, based on extensive testimony filed in the Florida PSC's docket for investigation and implementation of the FCC's August 2003 TRO of BellSouth's performance in conducting hot cuts, BellSouth has not proven the ability to cut over 1,000 loops per day per CO with 95% completed correctly without error or the same percentage of correct completions that the ILEC provides to its own customers. BellSouth has neither proven the ability to cut over 1,000 loops per day nor, in those few instances where it has cut over a few hundred loops per day, proven that 95% or more of those hot cuts were completed successfully. Third, based again on extensive testimony filed in

the Florida PSC's TRO docket, BellSouth has few, if any, wire centers where less than 5% of the customers cannot be reached via UNE-L. Finally, Supra has searched long and hard for alternative providers of unbundled local switching for mass market customers and has determined that there are no wire centers in BellSouth's territory where there are two or more competitive (non-ILEC) providers of mass market switching serving any given wire center. Based on BellSouth's failure to meet any of the criteria for the impairment test, Supra has determined that CLECs are impaired in all wire centers in BellSouth's territory in the State of Florida without access to BellSouth's unbundled local switching.

Interoffice Transport Should Continue to Be Unbundled Nationally.

Supra recommends that the Commission again find that CLECs are impaired without access to DS1 interoffice transport facilities. Further, Supra recommends that these interoffice transport must continue to be unbundled on a nationwide basis, unless the ILEC proves to the FCC that, on a specific interoffice route, there are at least two alternative providers of DS1 interoffice transport that are unaffiliated with the ILEC that are presently providing wholesale DS1 service on the route and are offering their wholesale transport services to other CLECs. If the FCC finds that an ILEC is not longer required to offer DS1 interoffice transport as an unbundled network element on a specific route, then the ILEC's rate is capped at its existing special access rate for that route. Supra supports

the comments and the analysis filed by ALTS on behalf of CLECs in regards to interoffice transport.

Loops Should Continue to Be Unbundled Nationally.

Supra recommends that the Commission again find that CLECs are impaired without access to the ILECs' unbundled loops. As discussed above, the ILEC faces virtually no competition in the wholesale market for the provisioning of wireline local loops. Despite the presence of a number of providers that self-provision local loops with alternative technologies (wireless carriers, cable TV companies, and electric companies) these technologies and their respective loops remain largely unavailable to wireline-based CLECs. Accordingly, the impairment standard for mass market loops must only consider technologies and facilities that are truly available to the CLEC and not theoretical possibilities.

Inasmuch as local loops terminate at a specific customer premise, the geographic market for local loops to residential mass market customers must be defined on a route-by-route basis. Supra recommends that the ILEC local loops must continue to be unbundled on a nationwide basis, unless the ILEC proves to the FCC that, for each specific loop route to a specific customer, there are at least two alternative providers of local loops that are unaffiliated with the ILEC that are presently providing wholesale local loop service for the specific loop route and are offering their wholesale loop services to other CLECs. If the FCC

finds that an ILEC is no longer required to offer a local loop as an unbundled network element for a specific loop route, then the ILEC's rate is capped at its existing retail loop rate for that route. For larger capacity loops, DS1 and larger, Supra supports the comments and the analysis filed by ALTS on behalf of CLECs in regards to unbundled loops.

7) We seek comment on whether the RBOCs' section 271 unbundling obligations need to be clarified or modified in light of *USTA II*.

The FCC should reaffirm that the BOCs are still required to provide CLECs with access to all unbundled network elements as required under sections 251 and section 271 of the Telecommunications Act of 1996. Each of the BOCs have approached Supra and requested to renegotiate the portions of Supra's interconnection agreement with them that they believe need to be modified based on the Commission's Triennial Review Order. However, Supra and the BOCs have a significant and irreconcilable difference of opinion regarding the Commission's rules; and thus, would greatly benefit from having the Commission clearly set forth the specific unbundling and pricing rules for each network element under both section 251 and section 271.

Supra asks that the Commission reiterate its requirement that the BOCs are required to provide unbundled network elements to CLECs and to combine those elements as required. For each network element, Supra requests that the Commission specifically identify the specific rule that requires each network element to be unbundled and combined with other network elements and the specific rule that governs the pricing of that network element. Supra does not believe that USTA II, in and of itself, changed the BOCs obligation to continue to provide unbundled network elements under section 271 as described by the Commission in its order. Supra also believe that USTA II did not change the pricing rules the Commission established in its Order. However, the LECs' interpret the unbundling and combining requirements as well as pricing requirements under USTA II differently than what Supra believes was originally envisioned by the FCC in its order despite the fact that the DC Court upheld the Commission's ruling on that issue. It is for this reason that Supra requests that the Commission undertake the laborious but necessary task of clarifying its rules for unbundling, combining, and pricing network elements and specifically discuss the application of its rules to each of the individual unbundled network elements in order to remove any confusion that may exist between ILECs and CLECs.

8) Commenters should address the questions posed in the FCC's 2001 *Triennial Review NPRM* to the extent the questions remain valid after *USTA*

I and USTA II. Specifically, the Commission requested comments on the relationship between UNEs and tariffed offerings.

While tariffed services may hold the potential to be substitutes for existing UNEs, current pricing and service restrictions of tariffed services prevent effective substitution of tariffed services for UNEs. UNE rules allow UNEs to be combined with a CLEC's own facilities and with other UNEs. The ILECs, however, prevent and oppose the combining of tariffed services with UNEs creating an enormous operational barrier to entry. Additionally, CLECs are free to use UNEs without any artificial restrictions and can provide virtually any telecommunications service over the UNEs. The ILECs, however, tightly control and restrict the use of tariffed services for specific purposes which would prevent the CLEC from utilizing the tariffed services in the manner they would if the service were under UNE rules rather than ILEC tariff rules. CLECs would not be able to provide the telecommunications services they currently provide if they were forced to use ILEC tariffed services with their current restrictions. Finally, UNEs are priced at TELRIC which, if TELRIC is correctly calculated, represents the BOCs true "cost" of providing service and allows the CLEC to share the economies of scale and scope that the BOC enjoys. Tariffed services, however, are often priced far above TELRIC. Inasmuch as there is seldom a competitive market for the overwhelming majority of tariffed services, these services are often priced at monopoly levels. A CLEC simply cannot compete against the large ILEC if the CLEC is forced to pay monopoly rents for tariffed services while the ILEC provides those same services to itself at TELRIC based prices.

9) The FCC would like parties to respond to the following raised additional questions:

The FCC incorporated the record generated by the petitions for reconsideration and clarification of the *Triennial Review Order*, including:

a) Broadband unbundling requirements, Section 271 access obligations, and access to signaling (See *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2635 (Oct. 9, 2003); 68 Fed. Reg. 60391 (2003))

The FCC can promote and facilitate faster deployment of broadband services by requiring the BOCs to unbundle broadband facilities as much as possible which will allow CLECs to compete in the market for broadband services. This competition will bring about, faster broadband deployment, new and improved services, and competitive pricing. If the BOCs are not required to unbundle broadband facilities, deployment will be much slower and prices will not decrease as quickly.

b) BellSouth's petition for temporary waiver of the Commission's rules regarding enhanced extended links (EELs). (BellSouth Telecommunications, Inc., Petition for Waiver, CC Docket Nos. 01-338, 96-98, 98-147 (filed Feb. 11, 2004))

BellSouth's petition should be denied. EELS can present a viable alternative to the loss of unbundled local switching if the ILECs can provide EELS on a cost-effective and operationally efficient basis to CLECs. In short, BellSouth's petitioned the FCC for a waiver of the requirement to process orders for EELS under the revised commingling and service eligibility requirements ("EEL requirements") set forth in the Commission's *Triennial Review Order* ("TRO"). BellSouth asks that the waiver remain in effect until the relevant state commissions have completed their determination of the routes and customer locations where high capacity UNEs will continue to be available.³⁰ Supra requests that the Commission deny BellSouth's petition for a waiver as it is based on BellSouth's wishful speculation that state commissions will find a significant number of transport routes unimpaired. Granting BellSouth's petition will only further delay the development of meaningful competition which will prevent telecommunications users from enjoying the benefits that competitive choice brings of lower prices, more service options, higher quality service, and better customer service. Supra has attached as Exhibit 1, comments Supra filed with the FCC on March 19, 2004 opposing BellSouth's petition for waiver of the Commission's rules regarding enhanced extended links (EELs).

c) ILEC obligations to file commercial agreements, under section 252 of the Act, governing access to network elements for which there is no

³⁰ See Petition p. 6.

section 251(c)(3) unbundling obligation.³¹ How should the FCC properly treat commercially negotiated agreements for access to network elements that are not required to be unbundled pursuant to section 251(c)(3) under section 252, section 211, or other provisions of law?

Although it has eight years since the passage of the Federal Telecommunications Act which allowed local competition and CLECs have spent hundreds of billions of dollars building their own local networks, the ILECs still remain the dominant provider of network elements and maintain a virtual monopoly over the wholesale market for unbundled network elements. As the monopoly provider of wholesale network elements, the ILECs have very little incentive to negotiate interconnection agreements with CLECs that will allow CLECs to access unbundled network elements. 271 relief was the one major motivation the BOCs had to unbundle their networks and negotiate agreements that would begin to allow CLECs to offer competing telecommunications services. Now that the reward of 271 relief has been captured by the BOCs, they have no incentive to offer CLECs access to their network and the CLECs have nothing to offer the BOC network monopoly providers in return; and thus, have no leverage to negotiate a reasonable deal with the BOCs. Because the BOCs are still predominantly the monopoly provider of unbundled network services and are likely to maintain a stranglehold over the local network for the foreseeable future,

³¹ SBC Communications, Inc., Emergency Petition for Declaratory Ruling, Preemption, and Standstill, WC Docket No. 04-172 (filed May 3, 2004); BellSouth, Emergency Petition for Declaratory Ruling (filed May 27, 2004); BellSouth, Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Section 252 with Respect to Non-251 Agreements (filed May 27, 2004).

CLECs should be given every opportunity to take advantage of any reasonable rate, term, or condition that another CLEC has negotiated. Accordingly, the ILECs should be required to file commercial agreements under section 252 of the Act and other CLECs should have Most Favored Nation rights to adopt in whole, or in part, those commercial agreements. If an ILEC negotiates an agreement in which it agrees to unbundle network elements that are not required to be unbundled pursuant to section 251(c)(3), section 252, section 211, or any other provisions of law, other CLECs should have the right to adopt that part of the commercial agreement and have access to those unbundled network elements.

If the wholesale market for local telecommunications network elements ever develops to the point where there are two or more nonBOC competitors in the marketplace offering competitive, alternative local facilities, then it would be reasonable to allow the BOCs to have tighter restrictions over the availability of the rates, terms, and conditions that it negotiates with CLECs. Commercial agreements that are allowed to be kept private are only appropriate in a competitive market place where there are several providers of a good or service and several buyers of a good or service. In a situation where there is just one monopoly provider of the good, such as the wholesale local telecommunications market where the BOC is the only provider of wholesale network elements, the bargaining power of the two parties (buyer v. seller) is unbalanced and the seller wields virtually all of the bargaining power. In order help weaken this enormous

October 4, 2004

bargaining power that the BOCs wield over the CLECs, the Commission should require the BOCs to make their commercially negotiated agreements available to all CLECs and should require the BOCs to offer all the same rates, terms, and conditions that the BOC has offered to other CLECs. By doing this, the FCC can help soften the enormous balance of power that the BOCs wield.

Respectfully submitted,

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(305) 476-4248
Fax: (305) 443-1078

October 4, 2004

Exhibit 1

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	
Carriers)	CC Docket No. 01-338
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of)	
1996)	CC Docket No. 96-98
)	
Deployment of Wireline Services Offering)	
Advanced Telecommunications Capability)	CC Docket No. 98-147

**COMMENTS OF SUPRA TELECOMMUNICATIONS
AND INFORMATION SYSTEMS, INC.**

IN OPPOSITION TO

BELLSOUTH'S PETITION FOR WAIVER

Jorge Cruz-Bustillo
Supra Telecommunications and Information Systems, Inc.
2620 27th SW Ave.
Miami, FL 33133

March 19, 2004

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	
Carriers)	CC Docket No. 01-338
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of)	
1996)	CC Docket No. 96-98
)	
Deployment of Wireline Services Offering)	
Advanced Telecommunications Capability)	CC Docket No. 98-147

**COMMENTS OF SUPRA TELECOMMUNICATIONS AND INFORMATION
SYSTEMS, INC.**

OPPOSING

BELLSOUTH’S PETITION FOR WAIVER

Supra Telecommunications and Information Systems, Inc. (“Supra Telecom”) a competitive local exchange carrier (“CLEC”) providing competitive local telecommunications services in Florida pursuant to Section 214 of the Communications Act of 1934 and state certificates of public convenience and necessity, hereby requests that the Commission deny BellSouth’s petition for a waiver of the requirement to process orders for EELS under the revised commingling and service eligibility requirements (“EEL requirements”) set forth in the Commission’s *Triennial Review Order* (“TRO”).

BellSouth asks that the waiver remain in effect until the relevant state commissions have completed their determination of the routes and customer locations

where high capacity UNEs will continue to be available.³² Supra requests that the Commission deny BellSouth's petition for a waiver as it is based on BellSouth's wishful speculation that state commissions will find a significant number of transport routes unimpaired. Granting BellSouth's petition will only further delay the development of meaningful competition which will prevent telecommunications users from enjoying the benefits that competitive choice brings of lower prices, more service options, higher quality service, and better customer service.

I. Introduction and Background

The Commission has a strong history of supporting local competition and taking the appropriate steps to force the incumbent LECs to open their monopoly networks to CLECs. Such a position is warranted because the ILEC network was built under decades of monopoly-provided service and financed with telecommunications users' dollars. These same telecommunications users should rightfully enjoy the benefit of the network they paid for by being able to access competitive LECs that are using that same network to provide competitive telecommunications services.

As part of the effort to allow telecommunications users the benefit of using the network they paid for, Congress and the FCC ordered the ILECs to unbundle the local network and provide UNE combinations to CLECs. In the UNE Remand Order, the FCC ordered ILECs to provide extended enhanced links ("EELs"). In the Supplemental Order, the FCC clarified the meaning of "significant amount of local usage" and provided three

³² See Petition p. 6.

safe harbor rules for defining a significant amount of local usage.³³ In the Commission's TRO, the FCC has reaffirmed the UNE combination requirement.³⁴ The FCC also stated that their rules "require incumbent LECs to make UNE combinations, including loop-transport combinations, available in all areas where the underlying UNEs are available and in all instances where the requesting carrier meets the eligibility requirements."³⁵

In the TRO, the FCC concluded that EELs "facilitate the growth of facilities-based competition in the local market" because EELs allow CLECs to reach customers in end offices other than the ones in which the CLEC is already collocated which reduces collocation costs; "promotes self-deployment of interoffice transport facilities by competitive LECs," and "promotes innovation."³⁶ BellSouth and other LECs have sought to impede CLECs' access to EELs by requiring CLECs to submit to pre-audits or to purchase special access facilities and then convert it to a UNE EEL. The FCC found that these ILEC requirements "constitute unreasonable, and discriminator terms and conditions for obtaining access to UNE Combinations and are prohibited by the Act and our rules."³⁷ Now, BellSouth has sought to impede CLECs' ability to use EELs by seeking a waiver from the requirement to provide EELs.

³³ At that time, the FCC temporarily constrained commingling EELs with special access; however, in the TRO, the FCC determined eliminated the commingling restriction (see TRO, para. 579).

³⁴ See TRO, para. 573.

³⁵ See TRO, para. 575.

³⁶ Id. para. 576.

³⁷ Id. para. 577.

II. BellSouth's Allegations Are Unfounded and Unsubstantiated.

BellSouth alleges that granting the waiver is necessary to “avoid wasting substantial resources likely from converting special access circuits to EELs before the states conclude their loop and transport impairment cases.”³⁸ However, BellSouth has not presented any substantive evidence to show that “substantial resources,” let alone any resources, will be wasted if the special access circuits that were converted to EELs were to be converted back again. BellSouth is seeking a waiver of Commission rules based on their speculation that certain UNE transport routes will be found unimpaired so that BellSouth will not have to offer UNE EELs to CLECs on those routes. Policy decisions and waivers should not be based on speculative outcomes but on the actual policies in place at the time of the request. Currently, and for the foreseeable future, BellSouth is required to provide UNE transport on every single one of its routes meaning that CLECs should have access to UNE EELS on every single one of BellSouth's transport routes. To grant BellSouth's petition for waiver of implementing EELs is to further delay competition based on nothing more than BellSouth's wishful speculation that they may prevail in the on-going state UNE transport impairment proceedings.

BellSouth does not provide any estimate of the alleged amount of “wasted resources.” BellSouth does not provide any estimate of the number of high-capacity circuits that BellSouth will demand carriers switch back to special access if the state commission finds non-impairment nor does BellSouth provide any dollar estimate. Rather, BellSouth merely states that not granting the petition will, “at least in some

³⁸ See Petition, p. 2

cases,”³⁹ result in provisioning of UNE circuits that may be converted back to special access. Additionally, BellSouth alleges that they will have significant stranded capital if the waiver is not granted. However, just like before, BellSouth does not provide any estimate of the alleged amount of stranded investment. What dire consequence has BellSouth alleged will occur if CLECs are required to convert EELs back to special access? “Wasted resources” and “endless possibilities for finger-pointing.”⁴⁰ In fact and substance, BellSouth has provided the FCC with nothing more than a declaration that the sky is falling.

BellSouth is curious in that they aren’t complaining that they won’t recover their costs or suffer any financial loss; only that “resources will be wasted.” BellSouth’s concern for wasted resources and that wasted resources are not in the public interest is far too late relative to the vast amount of capital and resources CLECs have expended over the past eight years trying to break the ILEC monopoly stranglehold on the local telecommunications market. After CLECs have invested literally billions of dollars in installing switches, laying fiber, and building local networks, BellSouth, under the guise of a concerned telecommunications industry citizen, comes forth and suggests that the industry cannot afford to waste the resources involved with switching a few EELs circuits back to switched access circuits. Is BellSouth equally concerned with the public interest when it wants to deny CLECs access to unbundled local switching or unbundled transport?

³⁹ See Petition, p. 4

⁴⁰ See Petition, p. 7

III. BellSouth's Petition Will Delay and Harm Competition

In the TRO proceeding, BellSouth and the other ILECs asked the Commission to expedite the changes caused by the TRO. The ILECs asked the FCC to “override the section 252 process and unilaterally change all interconnection agreements to **avoid any delay associated with the renegotiation of contract provisions**”⁴¹ in order to expedite implementation of the new requirements in the TRO. Now that BellSouth is faced with a provision it doesn't like, i.e., the EELs requirement, BellSouth is seeking to delay implementation of the TRO's requirement.

BellSouth is doing nothing more than stalling and further delaying the implementation of the FCC's order. BellSouth's petition delays competition and denies consumers the benefits of such competition. In the paragraph 703 of the TRO, the FCC found that delaying implementation of the new rules in the TRO would reduce investment and would harm competition. The FCC stated that:

We find that delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry.⁴²

The Commission must deny BellSouth's petition for waiver so that competition is not delayed and the industry does not suffer an adverse impact on investment and sustainable competition in the telecommunications industry.

⁴¹ See TRO, para. 701. See also Letter from Michael K. Kellogg, Counsel for SBC, Qwest and BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket 01-338 at 3-5 (filed Jan 21, 2003)(SBC/Qwest/BellSouth Jan. 21, 2003 *Ex Parte* Letter)

⁴² See TRO, para. 703.

BellSouth's temporary waiver may never expire. BellSouth has asked that the Commission for permission to delay provisioning EELs until the state commissions have completed their UNE transport impairment proceedings. However, it is inevitable that if the state commissions do not find all of the routes unimpaired that BellSouth has requested, that, BellSouth will appeal the decision and further delay a final decision. Then, BellSouth will likely file another petition seeking to extend the EELs waiver even longer, further delaying competition. If BellSouth has its way, it will undoubtedly seek to waive the requirement to provision EELs indefinitely using the excuse that a final non-appealable decision has yet to be reached.

IV. BellSouth's Waiver Is Overly Broad And Restrictive.

BellSouth seeks a waiver of the requirement to implement all EELs, including DS0, yet BellSouth only cites to concerns with high capacity transport and loops (DS1 and above). Granting BellSouth's petition would damage CLECs serving the mass market that are mainly seeking access to DS0 EELs especially if unbundled switching becomes unavailable. If granted, BellSouth's overly broad petition would prevent these competitive LECs from accessing DS0 EELs and would harm competition in the mass market.

V. BellSouth's Petition is Double Talk.

BellSouth is talking out of both sides of its mouth with its petition at the FCC and its UNE switching impairment proceeding at the Florida PSC. In the Florida PSC UNE-P

Impairment proceeding (Docket No. 030851-TP), BellSouth is telling the FPSC that CLECs can use DS0 EELs if unbundled switching (UNE-P) is eliminated. However, at the same time, BellSouth is asking the FCC for permission to not provide the very same EELs that will offer a modicum of relief if the FPSC removes BellSouth's requirement to provide unbundled switching. If BellSouth prevails in both proceedings, they will have eliminated unbundled switching and prevented CLECs from using EELs to circumvent the unavailability of unbundled switching, thus, completely shutting out CLECs from the local market. It is ironic, but not surprising that BellSouth relied on the existence of UNE-P competition to allege that its local markets were open in order to gain entry into in-region long distance and now BellSouth seeks to eliminate UNE-P competition by eliminating unbundled switching and the requirement to provide EELs.

V. Conclusion

The Commission should deny BellSouth's petition for a waiver as it is based on BellSouth's wishful speculation that state commissions will find a significant number of transport routes unimpaired. BellSouth provides no substantive evidence of any harm from denying its petition and only alleges that the telecommunications industry should be spared "wasted resources" and "endless possibilities for finger-pointing" for those few cases where BellSouth will demand the CLECs to convert EELs back to special access. As stated above, granting BellSouth's petition will only further delay the development of meaningful competition which will prevent telecommunications users from enjoying the benefits that competitive choice brings of lower prices, more service options, higher quality service, and better customer service. It is in the public interest that BellSouth's

petition be quickly denied so as to prevent the telecommunications industry from

“wasting resources” fighting such a ridiculous petition.

Respectfully submitted,

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